United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1220

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA :

Respondent, :

DOCKET NO.: 74-1220

-v- :

VINCENT ALOI, et. al, :

Defendant-Appellants. :

RALPH LOMBARDO, :

Petitioner :

- -X

PETITION FOR REARGUMENT OR
REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA, :

Respondent, :

-v- :

NOTICE OF MOTION

VINCENT ALOI, et. al, :

Defendant-Appellants. :

RALPH LOMBARDO, :

Petitioner :

- -X

S I R S :

PLEASE TAKE NOTICE that upon annexed affidavit of JOEL A. BRENNER and the prior proceedings herein the undersigned will move this Court for an order granting reargument or rehearing en banc of the above appeal, and for such other and further relief as the Court deems just and proper.

DATED: February 25, 1975
Mineola, New York

Yours, etc.
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cc: Hon. Paul J. Curran
United States Attorney
Southern District of New York
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Foley Square, New York 10007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA :

Respondent, :

-v- :

AFFIDAVIT

VINCENT ALOI, et. al, :

Defendant-Appellants. :

RALPH LOMBARDO, :

Petitioner :

- - - - - - - - - - - - - - - - - - - -X

State of New York)
ss.:
County of Nassau)

JOEL A. BRENNER, being duly sworn, deposes and says:

1. I am co-counsel for petitioner Ralph Lombardo and am fully familiar with the facts and circumstances of this case;

2. On February 5, 1974, petitioner was sentenced to five years in prison upon his conviction of wire and stock fraud and conspiracy in the United States District Court for the Southern District of New York (KNAPP, D.J.);

3. On June 24, 1974, petitioner's (and his co-appellants) appeal was argued before a panel of this Court (Moore and Feinberg, CJJ., and Palmieri, D.J.);

4. Over seven months later, on January 31, 1975, petitioner's conviction was affirmed (co-appellants Aloi's and Dioguardi's convictions were also affirmed; co-appellant Savino's conviction was reversed on the ground of insufficiency). United States v. ALOI, et. al, _____ F 2d _____, slip op. 6057 (2d Cir., 1/31/75) (a copy of this opinion is annexed to the moving papers of co-petitioner Aloi);

5. On February 19, 1975, an order was granting extending petitioner's time to file this petition;

6. The reasons for this petition are as follows:

(a) The main witness against petitioner was one Michael Hellerman, an admitted and convicted thief, perjurer and stock manipulator; as the opinion of this Court (written by Judge Moore) noted several times "Fundamentally the case resolved itself into a question of witness credibility" (slip op. at 6064; also 6078, 6088); inexplicably, however, the opinion contains not a single work about how the trial court prohibited petitioner's counsel's attempt to bring to the jury's attention the following facts bearing critically on Hellerman's credibility: during the time that Hellerman had an "extraordinary" agreement to co-operate with the Government (slip. op. 6077) he also had access to several safe deposit boxes which large sums of money were apparently kept;

since he claimed to have been unable to make restitution to his defrauded victims it would have been guite pertinent to show that, with or without the government's knowledge, he had access to large sums of money; the trial court prohibited this testimony; that portion of petitioner's brief in which this issue was set forth is annexed as Appendix "A" to this petition and it is respectfully contended that a reading of it will demonstrate why reargument or rehearing en banc is required;

(b) Petitioner had been called before a Nassau County Grand Jury and, after being given immunity, he was questioned on many issues which also formed the basis of his cross-examination in this case; the opinion stated that the trial court "investigated the facts...and concluded that the prosecution had not made use of such testimony...[and t]here is no basis for holding the court's ruling to have been clearly erroneous" (slip op. 6069); the opinion ignored two subsidiary but equally critical issues - firstly, that petitioner had been misled into believing that he had been given immunity from federal prosecution (App't's Br. Pt. IV (a) at 49-54) and, secondly, that the trial court improperly put the burden on petitioner to demonstrate the presence of taint, rather than on the Government to demonstrate its absence (App't's Br. Pt. IV (b) at 55-60, esp. 56n.*) (the entire

Point IV is reproduced as Appendix B to this Petition); because the opinion ignores serious issues concerning the interrelationship of state and federal prosecutions where one jurisdiction has granted immunity reargument or rehearing en banc should be granted;

(c) When petitioner was sentenced the court made it clear that it was taking into account the alleged perjury petitioner committed when he testified in his own behalf; in Point VI of Appellant's Brief (at pp 73-74) it was contended, citing SCOTT v. UNITED STATES, 419 F 2d 264 (D.C. Cir. 1969), that this was improper; while the appeal was sub judice another panel of this Court (Oakes, CJ., Frankel and Kellerher, DJJ) decided United States v. HENDRIX, 505 F 2d 1223 , slip. op. 5803, 5811 (2d Cir., 10/15/74) which held that "perjury should not be treated as an adverse sentencing factor unless the judge is persuaded beyond a reasonable doubt that the defendant committed it"; the panel which heard petitioner's appeal was advised of the Hendrix decision and it was pointed out that since Judge Knapp had not said he believed "beyond a reasonable doubt" that petitioner had committed perjury there should be a remand for resentencing; although some three pages of the opinion in this case (slip. op. 6084-66) were devoted to a discussion of the sentences imposed this issue was totally ignored; the application of Hendrix to

situations where, as here, it is unclear what standard was used when the sentencing court imposed additional time for alleged perjury requires reargument or rehearing en banc reconsideration;

7. Petitioner respectfully also adopts the arguments set forth in Petitioner Aloi's Petition for Reargument or Rehearing En Banc insofar as they are applicable to him (cf F.R. App. Proc. 28 [i]).

WHEREFORE, it is respectfully requested that an order be made granting reargument or rehearing en banc and for such other and further relief as to this Court seems just.

Joel A. Brenner

JOEL A. BRENNER

Sworn to before me this 25th day of February, 1975.

Martin S. Dorfman

MARTIN S. DORFMAN
Notary Public, State of New York
No. 41-6078330
Qualified in Queens County
Commission Expires March 30, 1976

APPENDIX "A"

POINT II

THE REFUSAL OF THE TRIAL COURT TO PERMIT DEFENSE COUNSEL TO INTRODUCE EVIDENCE OF HELLERMAN'S OWNERSHIP OF, AND INTEREST IN, SEVERAL SAFE DEPOSIT BOXES CONSTITUTED REVERSIBLE ERROR WHERE THAT EVIDENCE WAS RELEVANT TO SHOW HELLERMAN'S BIAS AND FAVOR.

Following a series of questions about whether he had secreted the proceeds of any of his stock fraud in Swiss banks, Hellerman was questioned about the existence of safe deposit boxes in his name or that of a nominee; he denied ownership of any such box and denied secreting any stock fraud proceeds therein (2045-47).

On the defendant's case an official of the First Israel Bank testified that Hellerman had leased a safe deposit box for one year on June 24, 1970 and renewed the lease on September 23, 1971. The access records (which were incomplete [3683]) showed visits on June 24 and June 27, 1970. Jeopardy assessments had been made on November 5, 1971 and December 10, 1971 and the box had been sealed on July 25, 1972 (3670-85).

The court ruled that this testimony was irrelevant because defense counsel's cross-examination of Hellerman about boxes had been directed only to the time of Hellerman's sentence (December 1972) and since at that time the box was inaccessible to him (because sealed) his denial was not contradicted by this testimony.

Defense counsel insisted that his cross-examination had not been so confined[*]; he contended that he was trying to demonstrate "bias and favor" in that the government did nothing about this box for almost two years after the "deal" with Morvillo to pay restitution. Furthermore, there were two other boxes and both of these were accessible to Hellerman even on the date of his sentence. The court ordered all three boxes opened and when no money was found refused to permit further testimony on the issue on the ground it was collateral. This was error.

It is hornbook law that the existence of bias or favor or corruption on the part of a witness is never collateral; accordingly, even extrinsic evidence is admissible to show it. 3A Wigmore, Evidence Section 948 (at pp. 783-84) and Section 1005 (at pp. 968-69) (Chadbourne rev. 1970). See, e.g., United States v. Briggs, 457 F.2d 908, 910-11 (2d Cir., 1972); United States v. Blackwood, 456 F.2d 526, 530 (2d Cir., 1972).

The government's entire case depended upon the jury believing Hellerman's testimony and, accordingly, any facts could be shown

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[*] Because defense counsel inserted two questions about restitution in between his questions about Swiss bank accounts and safe deposit boxes the court ruled that the questions about the safe deposit boxes were directed to the time the restitution had to begin to be made, i.e., the date of sentence. A reading of the questions (2045-47) would seem to indicate the court was wrong and defense counsel's contention that he was working from a list of subjects supports his claim that he had not shifted to another topic; in any event, it seems that this was preeminently an issue for the jury to resolve (see colloquy at 3891-96). The net effect of the court's ruling was to advise the jury that the First Israel Bank official's testimony was irrelevant.

"from which it might be concluded that the witness favors the party for whom he has testified . . . [or] 'shaded his testimony for the purpose of helping to establish one side of a cause only.'" United States v. Lester, 248 F.2d 329, 334 (2d Cir., 1957). Or, as this Court stated in the recent case of United States v. Blackwood, 456 F.2d 526, 530 (2d Cir., 1972):

> A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify.

Hellerman had made a deal with the government which included a promise to pay $100,000 restitution when able. If it could be argued to the jury that Hellerman had three safe deposit boxes at the time he made this deal, that the government knew or should have known of them, and that only one was ever proceeded against by the government (and that almost twenty months after the deal was made),* this would go far to support the contention that Hellerman was being favored by the government and was probably repaying them with his testimony.

In United States v. Wolfson, 437 F.2d 862 (2d Cir., 1970) one Rittmaster gave crucial testimony against the defendants, who offered to prove that after the witness gave this testimony the SEC gave him a

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* Murray Winter said he had told the government that he had heard Hellerman had a box at First Israel because "they had been anxious to get ahold of what's in it" (3313-14). Despite this "anxiety" the jeopardy assessments were not made until a year after the deal and the lien was not placed on the box for another eight months. Schoengold also believed he'd told an Assistant United States Attorney about this box (3053).

previously-refused "no action" letter. The refusal of the trial court to permit this testimony was held reversible error:

> In this interchange of correspondence, defense counsel would have had the material from which they could have argued to the jury that this was Rittmaster's reward and was his motive for his testimony against the defendants. Although the [lower] court said that the case 'just abounds with opportunities for attacking the credibility of this witness,' there had been no opportunity so directly to challenge his motives for giving his specific . . . trial testimony.* . . . The Duncan Parking Meter case established Rittmaster's willingness to commit perjury; the excluded correspondence would have established a motive to continue that practice in this case.
>
> [Id. at 874]

In this case, admission of the evidence would have given support to the argument that Hellerman's testimony constituted repayment for the favor the government did him by not impeding his access to the boxes and their contents for a long time after the restitution promise had been made.**

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*Cf. United States v. Pacelli, 491 F.2d 1108, 1119 (2d Cir., 1974): "Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial . . . [he] would probably have sought to make this letter [from the main government witness to Morvillo, which was not given to defense counsel] the 'capstone' of his attack on Lipsky's credibility."

**It is true that the boxes did not yield any cash, but they did reveal that large sums of money had once been contained therein. The First Israel Box contained an envelope reading "22,000-five and 27,000-five, $50,000" (4450); the Chemical Bank box yielded a "fat" rubber band and a slip of paper with "5" on it; and the Bankers Trust letter had a $2,000 money wrapper, dated 1/25/71 on which was written "51,000" and a second $2,000 wrapper stamped 7/27/70 and "10,000" (5055-59). The inferences to be drawn from this would have had a substantial effect on a jury that twice asked for safe deposit box testimony (5526, 5540).

In United States v. Padgent, 432 F.2d 701 (2d Cir., 1970) the main government witness had pled guilty but denied making a deal with the government. Defense counsel sought to question her about not being prosecuted for jumping bail so as to adduce facts from which the jury "could have concluded that Miss Daniels was rewarded for her testimony and therefore her testimony was false and unbelievable." The refusal of the trial court to permit this interrogation led to reversal in the following language:

> An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may well have an important personal stake in the outcome of the trial.
> [Id. at 704]

The Wolfson decision also noted that exclusion of the Rittmaster-SEC correspondence "deprived [the defense] of an opportunity to answer the government's argument that Rittmaster actually suffered a financial detriment by surrendering his $100,000 . . . salary, by arguing that his testimony had enabled him to receive $500,000." 437 F.2d at 874. In this case, Hellerman's testimony that he was paying vigorish on a usurious loan (from Lombardo) and that he needed "front money" to do the AYSL deal (also conveniently furnished by Lombardo) was made more believable by his claim that he was "broke" during this period of time. The introduction of the evidence of the existence of these boxes and their contents (and the inferences to be drawn therefrom) would have removed much of the force of this testimony which seriously implicated Lombardo.

Evidence of facts showing "proof of bias or motive to falsify . . . is never collateral (citing) for if believed it colors every bit of testimony given by the witness whose motives are bared. . . ." United States v. Blackwood, supra, 456 F.2d at 530 (Emphasis added). If the safe deposit box testimony had been admitted "and if such testimony [and the inferences therefrom were] believed by the jury, reasonable doubt as to the veracity of other prosecution witnesses could certainly have arisen."[*] United States v. Haggett, 438 F.2d 396, 399 (2d Cir., 1971) (emphasis added).

In United States v. Barash, 365 F.2d 395 (2d Cir., 1966) the main government witness was one Clyne. The lower court's refusal to admit certain evidence "pertinent on the score of bias" led to reversal with this statement:

> For the defense to establish that Clyne had lied about [one matter] would have an importance transcending that particular issue; the jury might well have concluded that, having lied on one subject, he had lied on all.
>
> [Id. at 401]

No doubt the government will argue that since Hellerman had been told he would be prosecuted for perjury if he lied he would not do so. It must be remembered, however, that this was part of the same "deal" as the restitution promise; therefore, a showing that the

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[*] Particularly where defense counsel suggested throughout the trial and argued in summation that the prosecution witnesses had concocted their testimony together.

government had not enforced the restitution portion of the deal would permit defense counsel to strenuously assert that Hellerman could lie in the belief that the "tell-the-truth-or-be-prosecuted-for-perjury" portion of the deal would also not be enforced.[*] At the least, the evidence of these boxes, directly contradicting Hellerman's denials would have seriously undercut the government's extensive reliance on this portion of the deal to support Hellerman's testimony (see prosecution summation at 5390-96).[**]

It is true that a small amount of evidence concerning Hellerman's ownership of a safe deposit box did come into the record before questioning of the First Israel Bank official was terminated (3668-87). However, no evidence of the other two boxes was ever put before the jury (all of the proceedings re: these boxes having been conducted in the absence of the jury [4299-4325]).

In United States v. Barash, supra, the lower court had excluded certain tapes which defense counsel claimed would show bias.

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[*] The judge expressly charged the jury that Hellerman's "perception" of his deal with the government "may well be vital to your appraisal of the reliability of Hellerman's testimony" (5470).

[**] The existence, in such a deal, of an understanding that a government witness will be dealt with more leniently than the strict terms of such a deal would indicate, and more leniently than his testimony at trial would indicate, is not unusual. The New York Times of April 25, 1974 carried a report of a case in which the government's main witness had a deal for the prosecutor to recommend leniency but had been told privately by the prosecutor that he could guarantee the witness would not go jail (p. 51, col. 1). Proof that a witness is being favored beyond the deal he testified to would certainly undercut his veracity.

However, because the prosecutor did not object until a series of questions about the contents of the tapes had already been asked and answered "defense counsel was able to get a large amount of the recordings before the jury - enough to include the point in his summation." Id. at 401. This Court ruled that the conviction still had to be reversed, particularly because "the judge's remarks . . . in effect instructed the jury to disregard the impeaching evidence that had already been elicited." Ibid. This is precisely what happened here when the trial court explicitly told the jury that this testimony "isn't relevant to this case" (3672). Cf. United States v. Pacelli, supra, 491 F.2d at 1119 to the effect that exclusion of evidence relevant to impeachment of crucial government witness will not be treated as harmless error.

Proof that the excluded evidence was not only not collateral but was crucial to the jury's determination of guilt or innocence is dramatically present on this record, for the jury twice requested testimony and documents relevant to Hellerman's ownership of safe deposit boxes; first the jury requested Hellerman's testimony in which he denied ownership of any such boxes (5526) and then, obviously not satisfied, they asked for the documentary records of the First Israel box (5540). However, the force of the contradiction between his testimony and the documents was blunted by the court's ruling (based on its belief that there was no contradiction) that all of this was irrelevant. Had the jury been given evidence clearly estab-

lishing that Hellerman had lied, had had safety deposit boxes containing objects indicating the boxes had held large sums of money, and that the government had not taken adequate steps to insure that Hellerman lived up to his agreement, the jury's belief in, and use of, Hellerman's testimony would have been significantly changed as would have been the few guilty verdicts that were returned.*/

In sum, the safe deposit box evidence was not collateral but was crucial to the issues in this case and the action of the trial court in excluding it was reversible error.

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*/ In United States v. Padgent, supra, the fact that the jury acquitted the defendant on one count showed that they had doubts about a government witness and was a clear indication that the exclusion of impeaching evidence affected their verdict. Here, the jury acquitted on numerous charges after even the limited impeaching testimony was reread.

APPENDIX "B"

POINT IV

THE MOTION FOR A NEW TRIAL SHOULD HAVE BEEN GRANTED

(a) Where a State Grand Jury Witness Is Affirmatively Misled to Believe that He Was Receiving Federal Transactional Immunity, It Was a Violation of Due Process and Fundamental Fairness for the Federal Government to Indict Him for, and Elicit Testimony about, Immunized Transactions.

When Lombardo was first given immunity in the Nassau County Grand Jury, he immediately inquired as to its scope. The pertinent colloquy was as follows:

> Q. I remind you, Mr. Lombardo, you're still testifying under oath and now under the grant of immunity which has been conferred upon you by the Foreman of the Grand Jury.
>
> Do you understand that?
>
> A. Yes, but there's one thing that isn't clear to me, sir. On this immunity, what is the scope of this, territory-wise? Is it just New York State? Nassau County? Or is this a federal--
>
> Q. Have you asked your attorney this question?
>
> A. Yes, but he doesn't seem to be sure, also because I don't remember when the Foreman read the scope of the immunity whether or not it covered this area.
>
> Q. Mr. Lombardo, you are receiving and have received in connection only with your testimony full and complete immunity.

In other words, full and complete, I believe are self-explanatory. There are cases which have evolved under the law which described full and complete to mean exactly full and complete immunity.

A. Yes, I understand that.

Q. You understand that?

A. But when the Foreman read it to me he mentioned the word, "County," and "New York State," and--

Q. Well, that was, that was--

A. --pertaining to--

Q. --pertaining to some of the crimes.

A. Oh, I understand.

Q. You see. In answering your questions only in testifying to questions do you receive immunity, and then that immunity is full and complete.

A. Right.

THE FOREMAN: Mr. Spinnato, just to clear the point, you mentioned that I had mentioned County and New York State, that was in connection with the scope of the investigation. It was not part or parcel of the grant of immunity.

THE WITNESS: Okay, thank you.

BY MR. SPINNATO:

Q. Do you understand that?

A. Yes, full and complete immunity.

[Minutes 9/25 70 at 23-25]

In response to an explicit question as to whether the immunity extended to the federal government,[*] Lombardo was told that the references in the grant to "county" and "state" only referred to the scope of the invesigation and did not restrict the scope of the immunity, and that he had full and complete immunity. He gave testimony before the grand jury about his relationship to Michael Hellerman and Michael's Steak House (mins. 10/1/71) and was indicted by the federal government for an alleged extortionate loan to Hellerman to set up Michael's Steak House (Count 38 of 73 Cr. 699) and Hellerman was permitted to testify about this transaction. (See Point III, [a], supra)

He gave testimony before the grand jury about numerous monetary transactions between himself and other individuals (e.g., Thomas Petrizzo, Sebastian "Buster" Aloi, Philip Yanovich, etc.) and was exhaustively cross-examined about the se matters at his federal trial.[**] (See Point III[b], supra)

In Johnson v. United States, 318 U.S. 189 (1943), the trial court had held that a defendant-witness could rely upon his privilege against self-incrimination but permitted the prosecutor to comment on the taking of the privilege. The Supreme Court held that this was

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[*] Which also had transactional immunity statutes at that time. See Kastigar v. United States, 406 U.S. 441, 452 (1972); cf. 18 U.S.C. sections 6001 et seq., effective 12/14/71.

[**] The hearing court recognized that the federal trial evidence covered the same transactions as the Nassau County Grand Jury when it ruled that if New York State's grant of transactional immunity bound the federal government it would have to grant the new trial motion. (Minutes of New Trial Hearing at 89-102, 130, 134-39).

a "mockery of justice." Id. at 197.* Similarly, in Raley v. Ohio, 360 U.S. 423 (1959), the Supreme Court reversed convictions for refusal to testify before a state commission where the defendants had been told they could take the Fifth Amendment and had not been told they would automatically receive immunity if they testified:

> [T]o sustain the judgment of the Ohio Supreme Court . . . after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State - convicting a citizen for exercising a privilege which the State clearly had told him was available to him. Cf. Sorrells v. United States, 287 U.S. 435, 442 . . . Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. Johnson v. United States, 318 U.S. 189, 197.
>
> [Id. at 438]

See also, People v. Masiello, 28 N.Y. 2d 287, 291 (1971) ("Fundamental fairness also suggests that a witness, who is also a potential criminal defendant, should not be misadvised concerning the scope of immunity if the grant of immunity has been amplified or explained in any way"). Cf. Cox v. Louisiana, 379 U.S. 559, 571 (1965).

The possibility that Lombardo might have testified in precisely the same manner if he had been properly advised of the scope of immunity is immaterial. Cf. Raley v. Ohio, supra, 360 U.S. at 439;

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* The conviction was affirmed because defense counsel waived the error by refusing to object. Here, by contrast, Lombardo's trial counsel moved to prevent any reference to theimmunized testimony at the beginning of trial (Minutes 10/30/73 at 14-16) and renewed the request throughout the trial (230-37, 4679-81, 4686-87, 4712-13, 4715).

People v. Masiello, supra, 28 N.Y.2d at 293. Furthermore, Lombardo might have refused to testify and risked contempt. Cf. Johnson v. United States, supra, 318 U.S. at 197 ("If advised by the court that his claim of privilege though granted would be employed against him, he well might never claim it"). Lastly, he might have raised legal objection to New York's right to require his testimony without being able to bind the federal government to transactional immunity.*/

It is irrelevant that the statements of the Assistant District Attorney and the Grand Jury Foreman were apparently in error under Murphy v. Waterfront Commission, 378 U.S. 52, 79 (1964) (witness given state transactional immunity receives only federal use immunity). See Johnson v. United States, supra, 318 U.S. at 197. "The fact that the privilege was mistakenly granted is immaterial"; Raley v. Ohio,

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*/ Murphy v. Waterfront Commission is not dispositive of this particular issue, because, as the Court pointed out several times, it was only deciding the minimum interjurisdictional immunity which the Fifth Amendment required jurisdiction B to grant if someone exercised his privilege against self-incrimination in jurisdiction A in the absence of an immunity statute. Id. at 79. The Court's opinion never mentioned that the state statute involved granted transactional immunity and never distinguished between use and transactional immunity statutes. Id. at 78. Since petitioners contended that states could in no way bind the federal government (and, therefore, could not compel testimony without violating a witness' federal Fifth Amendment privilege) they never argued that a state grant of transactional immunity might entitle them to more federal immunity than a state grant of use immunity. Id. at 53-54. This is precisely the argument Lombardo could have set forth if he had been properly advised. In 1970 and 1971, the meaning of Murphy, the law of interjurisdictional immunity, and the necessary scope of any immunity were all quite unclear. Kastigar v. United States, 406 U.S. 441 (1972) only settled some of these issues.

supra, 360 U.S. at 438; reversal called for although "there is no suggestion that the Commission had any intent to deceive the appellants."*/

The fact that the misleading advice was given in one jurisdiction while the inquiry was suffered in another is also of no relevance. Murphy v. Waterfront Commission, supra, established that the Fifth Amendment required at least some immunity in the federal jurisdiction when immunity was given under the laws of another jurisdiction.**/ Raley, Johnson and Masiello, supra, established that the due process clause is violated if a defendant is injured by the use of testimony he gave under a misleading grant of immunity. The combination of these rules requires reversal here and the granting of a new trial.

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*/ Similarly, the fact that Lombardo fleetingly discussed the scope of the immunity with his attorney (who was "not sure" of the scope) does not cure the misleading advice. People v. Masiello, supra, 28 N.Y.2d at 292: "Consequently, it is important than an official purporting to confer immunity must not misstate the scope of immunity as he views it, regardless of the fact that the witness or his lawyer may feel that the official advice is wrong as a matter of law. Moreover . . . it does not seem fair that the witness or his lawyer should be held to a better knowledge (of the scope of immunity) than (the prosecutor) whatever the fact." cf. Johnson v. United States, supra, 318 U.S. at 199.

**/ In Murphy, the petitioners had argued that the New York State immunity "did not purport to extend" to the federal government, Id. at 54, but the Supreme Court held it did via the "policies and purposes" of the Fifth Amendment. If the Court found a Fifth Amendment right where the petitioners disavowed it, there must be an even greater right where a witness asks for it and is told that he has it.

(b) The Prosecution Did Not Sustain the Heavy Burden of Demonstrating that All the Evidence They Used to Cross-Examine Defendant Was Derived from Untainted Sources.

Assuming, arguendo, that Lombardo did not receive federal transactional immunity (either by operation of law or under the particular circumstances of this case) he had, at least, "use and derivative use" immunity in the federal courts. (Murphy v. Waterfront Commission, 378 U.S. 52 [1964]). Accordingly, if he demonstrated:

> that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
>
> [Murphy v. Waterfront Commission, supra, 378 U.S. at 79 n. 18]

Commenting upon this burden in Kastigar v. United States, 406 U.S. 441 (1972) the Supreme Court said:

> This burden of proof, which we affirm as appropriate, is not limited to a negation of taint; rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. . . . One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate, independent sources.
>
> [Id. at 460, 461-62; emphasis added]

Perusal of the Nassau County Grand Jury minutes makes it clear that Lombardo did testify under compulsion to matters on which he was subsequently cross-examined at the federal trial.*/ Accordingly, the prosecution must sustain its heavy burden of demonstrating not only that it did not use tainted sources for the information used on cross-examination, but that it had independent sources.**/ It is submitted that this was not done.***/

It is clear that this was a classic example of a parallel state-federal investigation with each side giving and receiving information from the other.

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*/ This was recognized by both the prosecutor and the hearing judge (H. 29, 101) (References to the Hearing are designated "H"). In fact the prosecutor early in the hearing asked to be permitted to meet the burden he felt had been placed upon him (H. 29-30). The hearing judge, however, imposed the further burden on Lombardo's counsel of showing that Lombardo testified to something new before the grand jury and that the federal government used it (H. 95, 100, 101 ["Your burden is to show the grand jury testimony had some effect"], 130, 134-39). It is respectfully submitted that this imposition was erroneous and in direct contradiction to the quoted passages from Murphy and Kastigar.

**/ The fact that the immunized testimony was used re: cross-examination rather than direct prosecution (because Count 38 was severed) is irrelevant. The government raised this same claim in United States v. Hockenberry, 474 F.2d 247 (3d Cir., 1973) and it was emphatically rejected as "so narrow[ing use] . . . immunity as to jeopardize its adequacy as a constitutional means of requiring self-incrimination." Id. at 250.

***/ In this case, the same facts which show that the government did not support its burden of demonstrating no taint also show that no legitimate and independent source existed for "all of the evidence" used by the government.

John Bjorklund had been the agent in charge of the F.B.I. office for Nassau County and had been investigating the "Columbo" family and Lombardo's relation to it (H. 47, 63-64). In 1969, he became the chief investigator for the Nassau County District Attorney's Office and, continuing his investigation of the Colombo family and Lombardo, he assigned special investigator Al Smith to investigate him (H. 146). At the same time, the F.B.I. assigned agent Martin Boland to continue to investigate the Columbo family and Lombardo (H. 83, 103).

Boland met with Bjorklund and/or Smith numerous times to discuss matters of mutual interest - and Lombardo's name was mentioned almost every time (H. 53, 55, 85, 126). These meetings were before, during and after Lombardo would appear before the Nassau County Grant Jury (H. 55, 88-89). Boland was apparently advised when Lombardo was to appear before the Grand Jury and Boland admitted that he might have been outside the Grand Jury room when Lombardo testified.[*] (H. 69, 88-89, 124, 128, 132-39). On these occasions he would talk to Bjorklund and/or Smith about Lombardo. Bjorklund and Smith both testified they had read Lombardo's Grand Jury testimony (H. 62, 175) but that they did not reveal to Boland the questions or answers contained therein.

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[*] Assistant District Attorney Spinnato recalled seeing "agents from other law enforcement agencies" and being told F.B.I. agents Boland and Welsh were outside the Grand Jury room (H. 22-24).

It is not being contended that Smith or Bjorklund deliberately leaked information from Lombardo's Grand Jury appearances to the F.B.I. or the S.E.C.; rather, it is contended that where state and federal law enforcement officials with a "common background" and "mutual interests" (H. 55) meet to discuss an individual who has testified before a state grand jury (and whose testimony has been read by the state officials) the government must go to extraordinary lengths to sustain its heavy burden of demonstrating an absence of taint.

On cross-examination of Mr. Smith, the prosecutor asked a question which demonstrates precisely why the government did not sustain its burden of showing no taint:

> Q. Now, did you ever discuss the contents of this [Grand Jury] testimony or any questions or answers or subjects raised--strike the subjects raised--any questions and answers from the testimony with any federal officer?
>
> A. No, sir.
>
> [H. 163; Emphasis added]

This question and answer is very revealing in its implications: Smith never revealed precise "questions and answers" but he could not testify he never discussed the "subjects raised" during Lombardo's Grand Jury appearances.*/

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*/ Smith admitted that he lumped together all the information that he received from outside sources and from reading the grand jury minutes and then would "try very hard" to make sure the information he gave to Boland and Fox came only from the former. Government Exhibits 7 and 8 indicate that this attempt failed because Smith had told Boland of Lombardo's past and future grand jury appearances. Bjorklund also admitted that he might have told Boland that Lombardo had been questioned before the grand jury about Petrizzo (H. 67).

In United States v. McDaniel, 482 F.2d 305 (8th Cir., 1973) a similar problem arose. An Assistant United States Attorney had read a defendant's state grand jury testimony before he presented the case to a federal grand jury. In affirming an order vacating the conviction, the court said the government had not supported its burden of negating taint:

> In so concluding, we cast no reflection upon the integrity or motives of the United States Attorney . . . But even so, the United States Attorney is subject to human frailties. Thus, although he asserts that he did not use McDaniel's testimony in any form, we cannot escape the conclusion that the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case.
>
> [Id. at 312]

The court in McDaniel cited with approval the decision of Judge Metzner in United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973), rev'd on other grds, ___ F.2d ___, slip op. 1603, 1614 n. 15 (2d Cir., 1974). In that case an Assistant United States Attorney had read a transcript of immunized testimony but could not say why or whether he had used it in presenting the case to a grand jury. In dismissing those counts of the indictment relating to the immunized testimony, Judge Metzner ruled:

> It seems to me that once the subject matter was touched upon in the privileged testimony, and the prosecutor has read it, he could have used it in a variety of ways in this criminal prosecution. The possibility of such use, and the impossibility of clearly showing that the use did not occur, calls for the holding in this case that the defendants

were denied the constitutional protection
that their silence would have given them.
[Id. at 687]

Of course, it makes no difference that the prosecutors in this case did not actually read the grand jury testimony since their information came in a direct line (Boland and Fox) from those who had done so (Smith and Bjorklund).*/

In Murphy v. Waterfront Commission, supra, both the majority and concurring opinions emphasized the importance of protecting an immunized individual against the misuse of his testimony by another jurisdiction, "especially . . . in our age of co-operative federalism, where the Federal and State Governments are waging a united front against many types of criminal activity," 378 U.S. at 55-56 and 91-92. Where, as here, the co-operation was so close and so continuous, the records show that the government did not meet its burden under Murphy and Kastigar and there must be a new trial.

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*/ It is true that Boland had testified that he had certain information about some of the matters about which Lombardo testified in the grand jury before those proceedings took place. However, it was not until after Lombardo had testified and Boland had spoken with Smith and Bjorklund that Boland gave the prosecutors the information they used on cross-examination (H. 103-04, 107). Accordingly, any originally untainted information had become inextricably intertwined with tainted information by the time it got to the prosecutors and Boland cannot meet the test of being an "adequate legitimate source for all of the evidence used by the government." Kastigar, supra. Fox, of course, had no prior information about Lombardo and his relation to JCLD and Standard Container before he spoke to Smith (H. 186-87) and the information he received from Smith about this relation had come out during Lombardo's grand jury appearances; Fox was thus not an independent source of this cross-examination information. The Fox memo which seemed to contain mainly material furnished by Smith was concededly used by Littlefield for his cross-examination. Also note, no stipulation on Schreiber's testimony has been submitted, although promised by the government (H. 221).